Supreme Court, U. S.
FILED
AUG 30 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 75-1413

WAYNE A. STANTON, etc., *et al.*,

Petitioners,

v.

LOUISE BOND, etc., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS

IVAN E. BODENSTEINER
Indiana Center On Law & Poverty
Valparaiso University
School of Law
Valparaiso, Indiana 46383
Telephone: (219) 464-5433

Attorney for Respondents

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. AN AWARD OF ATTORNEY FEES AGAINST STATE OFFICIALS IS ANALOGOUS TO THE TAXING OF COSTS OF LITIGATION, WHICH IS NOT BARRED BY THE ELEVENTH AMENDMENT	4
II. ATTORNEY FEES HAVE A PERMISSIBLE "ANCILLARY EFFECT ON THE STATE TREASURY" WHICH IS NOT BARRED BY THE ELEVENTH AMENDMENT	9
CONCLUSION	17

TABLE OF AUTHORITIES

Cases:

Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975)	3,11
Bond v. Stanton, 372 F. Supp. 872 (N.D. Ind. 1974), *aff'd,* 504 F.2d 1246 (7th Cir. 1974), *cert. denied,* 420 U.S. 984 (1975)	2,10
Boston Chapter N.A.A.C.P., Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied,* 421 U.S. 910 (1975)	6,7
Class v. Norton, 505 F.2d 123 (2d Cir. 1974)	7,12
Downs v. Department of Public Welfare, 65 F.R.D. 557 (E.D. Pa. 1974)	8,16
Edelman v. Jordan, 415 U.S. 651 (1974)	*passim*
Employees v. Department of Public Health and Welfare, 411 U.S. 270 (1973)	14,15,16

Page

Fairmont Creamery Co. v. Minnesota, 275 U.S. 70 (1927) 3,4,5,6,7,9

Fitzpatrick v. Bitzer, ____ U.S. ____, 96 S. Ct. 2666 (1976) 3,5,7,14

Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967) 3

Goldberg v. Kelly, 397 U.S. 254 (1970) 10,11

Graham v. Richardson, 403 U.S. 365 (1971) 10,11

Hall v. Cole, 412 U.S. 1 (1973) 3

Hallmark Clinic v. North Carolina Dept. of Human Res., 380 F. Supp. 1153 (E.D.N.C. 1974), *aff'd*, 519 F.2d 1315 (4th Cir. 1975) 13

Hutchinson v. Lake Oswego School District No. 7, 519 F.2d 961 (9th Cir. 1975) 7

Illinois v. Allen, 397 U.S. 337 (1970) 15

Jordan v. Fusari, 496 F.2d 646 (2d Cir. 1974) 12

Jordan v. Gilligan, 500 F.2d 701 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1974) 5,8,12,13

LaRaza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972), *aff'd* 488 F.2d 559 (9th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974) 8

Massachusetts Bd. of Retirement v. Murgia, ____ U.S. ____, 96 S. Ct. 2562, 2564 n.1 (1976) 13

Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) 3,8

Monaco v. Mississippi, 292 U.S. 313 (1933) 5

Murgia v. Commonwealth of Mass. Bd. of Retirement, 386 F. Supp. 179 (D. Mass.), *aff'd*, 421 U.S. 972 (1975) 8,13

Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) 8

Parden v. Terminal R. Co., 377 U.S. 184 (1964) 14

Runyon v. McCrary, ____ U.S. ____, 96 S. Ct. 2586 (1976) 3

Page

Sims v. Amos, 340 F. Supp. 691 (M.D. Ala.), *aff'd*, 409 U.S. 942 (1972) 8,13

Snyder v. Massachusetts, 291 U.S. 97 (1934) 15

Sousa v. Travisano, 512 F.2d 1137 (1st Cir. 1975), *vacated and remanded for consideration in light of Alyeska*, 423 U.S. 809 (1975) 7,12

Sprague v. Ticonic National Bank, 307 U.S. 161 (1939) 3,6

Swanson v. American Consumer Industries, Inc., 517 F.2d 555 (7th Cir. 1975) 6

Taylor v. Perini, 503 F.2d 899 (6th Cir. 1974), *vacated and remanded for further consideration in light of Alyeska*, 421 U.S. 982 (1975) 8

Thonen v. Jenkins, 517 F.2d 3 (4th Cir. 1975) 7,13

Wood v. Strickland, 420 U.S. 308 (1975) 16

Ex parte Young, 209 U.S. 123 (1908) 10,11,12,16,17

Miscellaneous:

6 J. Moore, Federal Practice 8

Note, Attorneys' Fees and the Eleventh Amendment, 88 Harv. L. Rev. 1875 (1975) 11,14

Statutes:

Civil Rights Act, 42 U.S.C. §1983 1,16

Civil Rights Act of 1964, 42 U.S.C. §2000e-5(k) *et seq.* 14

Interstate Commerce Act, 49 U.S.C. §16(2) 8

Securities Act, 15 U.S.C. §77k(e) 8

Emergency School Aid Act of 1972, 20 U.S.C. §1617 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 75-1413

WAYNE A. STANTON, etc., *et al.*,

Petitioners,

v.

LOUISE BOND, etc., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS

QUESTION PRESENTED

Whether a federal court, after finding bad faith on the part of state officials which necessitates litigation and occurs during the course of the litigation, has the power to order the state officials to pay the plaintiffs reasonable attorney fees in an action under 42 U.S.C. § 1983.

A. Whether an award of attorney fees is analogous to taxing of court costs against state officials which is not barred by the eleventh amendment.
B. Whether an award of attorney fees has a permissible "ancillary effect on the state treasury" which is not barred by the eleventh amendment under *Edelman v. Jordan.*

STATEMENT OF THE CASE

Petitioners' statement of the case is misleading in two respects. First, plaintiffs' complaint challenged more than the acceptability of Indiana's EPSDT program; it also challenged the failure of the defendants to have *any* program in eighty-four (84) of the ninety-two (92) counties in the State. Second, the district court found bad faith on the part of the defendants both in necessitating the litigation ("they were more than two years late in even attempting to implement a statewide EPSDT program") and in their conduct during the litigation (they "continually asserted compliance with HEW requirements in the face of documentation to the contrary"). This finding was affirmed below, *Bond v. Stanton,* 528 F.2d 688, 690 (7th Cir. 1976), and has not been challenged in this Court.

SUMMARY OF ARGUMENT

This Court has recognized on several occasions that attorney fees are properly a part of equitable relief where there has been a finding of bad faith.

> Indeed, the power to award such fees 'is part of the original authority of the chancellor to do equity in a particular situation,' *Sprague v. Ticonic National Bank,* 307 U.S. 161, 166 (1939), and federal courts do not hesitate to exercise this *inherent equitable power* whenever 'overriding considerations indicate the need for such a recovery.' *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375, 391-92 (1970); *see Fleishman Distilling Corp. v. Maier Brewing Co.,* 386 U.S. 714, 718 (1967). (emphasis added)

Hall v. Cole, 412 U.S. 1, 5 (1973).[1] Since the district court has found bad faith, a finding not at issue in this Court, the only issue is whether the award is barred by the eleventh amendment. Respondents contend that the eleventh amendment does not prohibit the award of attorney fees granted by the district court, and affirmed by the Court of Appeals below, for several reasons.

First, they argue that attorney "fees [are] in the same category as other litigation costs," *Fitzpatrick v. Bitzer,* ____ U.S. ____, 96 S. Ct. 2666, 2673 (1976) (Stevens, J., concurring), which are not barred by the eleventh amendment. *See Fairmont Creamery Co. v. Minnesota,* 275 U.S. 70 (1927). The analogy between attorney fees and costs is particularly appropriate where, as here, the basis for the award of fees is the bad faith of the state officials who were found to have caused the litigation.

---

[1] The bad faith exception to the American rule regarding attorney fees is still recognized even after the generally limiting decision in *Alyeska Pipeline Co. v. Wilderness Society,* 421 U.S. 240, 258-59 (1975). ("These exceptions [including bad faith] are unquestionably assertions of inherent power in the courts to allow attorneys' fees. . . ."). *See also, Runyon v. McCrary,* ____ U.S. ____, 96 S. Ct. 2586, 2600 (1976).

Second, it is argued that an award of attorney fees has only an "ancillary effect on the state treasury" which is permissible under this Court's decision in *Edelman v. Jordan*, 415 U.S. 651 (1974). Attorney fees, like other incidental litigation expenses, are a necessary consequence of suits seeking to require state officials who have acted in bad faith to comply with federal law in the future. Such fees are *not* damages and are *not* "measured in terms of monetary loss resulting from a past breach of a legal duty." *Id.* at 668.

ARGUMENT

I.

AN AWARD OF ATTORNEY FEES AGAINST STATE OFFICIALS IS ANALOGOUS TO THE TAXING OF COSTS OF LITIGATION, WHICH IS NOT BARRED BY THE ELEVENTH AMENDMENT

There is no eleventh amendment bar to the award of attorney fees in this case since they are clearly analogous to costs which have been held recoverable against states. At least since *Fairmont Creamery Co. v. Minnesota*, 292 U.S. 70 (1927), this Court has recognized that, in both civil and criminal litigation, states have no immunity from the award of costs. *Fairmont Creamery* involved a claim that the doctrine of sovereign immunity barred the Supreme Court's award of costs against the State of Minnesota following reversal of a state criminal conviction on constitutional grounds. The Court viewed the award of such costs as

incident to its jurisdiction and "the invariable practice" of the courts. *Id.* at 77. Although the Court was interpreting the doctrine of sovereign immunity, the principles clearly apply here because the eleventh amendment is a constitutional embodiment, *albeit partial*, of the common law doctrine of sovereign immunity. *See Monaco v. Mississippi*, 292 U.S. 313, 330 (1933); *Fitzpatrick v. Bitzer, supra*, 96 S. Ct. at 2671; *Jordan v. Gilligan*, 500 F.2d 701 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1974).

In a recent decision by the First Circuit, the *Fairmont Creamery* case was applied to uphold a levy of costs against the state. The court there held:

> In *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70, 48 S. Ct. 97, 72 L. Ed. 168 (1928), there is support for the view that the power to tax court costs is to be characterized as an incident to the hearing and not within the scope of a state's sovereign immunity if the federal court's exercise of jurisdiction over the state party in the action in the main is valid. The Court in *Fairmont* held that sovereign immunity did not protect a state against a judgment for costs in litigation before the Supreme Court on an appeal from the final judgment of the highest state court. While acknowledging that a sovereign is immune from costs awarded by its own courts, the Court stated that a state loses some of its sovereign character when it is forced to appear before the Supreme Court under the Supremacy Clause on a matter of federal and constitutional law. According to the Court the 'incidents of the hearing are those which attach to the regular jurisdiction of this Court,' and the awarding of costs was one such incident that had been 'the invariable practice' in judgments against a state in both civil and criminal cases before that Court. *Id.* at 77, 48 S. Ct. at 100.
>
> * * *

> In view of the above consideration and precedents, we conclude that the Eleventh Amendment does not immunize appellants from being taxed for costs.

Boston Chapter N.A.A.C.P., Inc. v. Beecher, 504 F.2d 1017, 1029 (1st Cir. 1974), *cert. denied,* 421 U.S. 910 (1975).

The awarding of costs is clearly not an award of a money judgment as punishment for the past breach of a legal duty by state officials, but is merely an incident to the granting of injunctive and declaratory relief. Thus, *Edelman v. Jordan, supra,* cannot be held to bar costs since it held only that the eleventh amendment bars retroactive welfare payments which are "indistinguishable in many aspects from an award of damages" for past breaches of legal duties. *Id.* at 668. No mention was made in *Edelman* of *Fairmont Creamery* and, without a doubt, the latter case survives the former.

If costs can be loosely defined as expenses of litigation, then it seems that attorney fees are of the same class. Of course, the two are not identical, as recognized in *Sprague v. Ticonic National Bank,* 307 U.S. 161 (1939), and *Swanson v. American Consumer Industries, Inc.,* 517 F.2d 555 (7th Cir. 1975); however, they are generically the same. Following the decision in *Boston Chapter N.A.A.C.P. Inc. v. Beecher, supra,* the First Circuit soon made the analogy between costs and attorney fees:

> If, as we held in *Boston Chapter N.A.A.C.P.* the eleventh amendment allows costs to be assessed against state officials, it is hard to see why it should bar attorneys' fees. Both are in similar relationship to the main litigation and both should

> stand or fall together. It is true that there is less sanction in our law for attorney's fees; and the awarding of fees in these precise circumstances and upon the rationale we approved in *Hoitt* has yet to be considered by the Supreme Court. Conceivably costs, being more traditional than attorneys' fees, are allowable, but attorneys' fees are not. Conceivably attorneys' fees based on certain rationales are allowable but others are not. Nonetheless whatever the situations ultimately deemed suitable for the award of the attorneys' fees, *such fees,* to the extent allowable, *seem to us generically to be the same as court costs. They are a part of the litigation expense deemed,* for whatever reason, *recoverable by the successful party or attorney.* Any effort to distinguish for eleventh amendment purposes on the basis of theories of award would invite endless confusion. And to the extent states and state officials are, under our federal system, amenable to suit in federal courts, they should be responsible for costs and fees incidental to litigation to the same degree as others. To that extent, as the Supreme Court said in *Fairmont,* a state may lose 'some of its sovereign character.' 275 U.S. at 77, 48 S. Ct. 97. Accordingly, for reasons set forth in *Boston Chapter, N.A.A.C.P.,* we hold that attorneys' fees, like costs, are not barred by the eleventh amendment. (emphasis added)

Sousa v. Travisano, 512 F.2d 1137, 1140 (1st Cir. 1975), *vacated and remanded for consideration in light of Alyeska* (presumably because of reliance on private attorney general theory), 423 U.S. 809 (1975).[2]

[2] *See also Fitzpatrick v. Bitzer,* ____ U.S. ____, 96 S. Ct. 2666, 2673 (1976) (Stevens, J., concurring); *Thonen v. Jenkins,* 517 F.2d 3, 7-8 (4th Cir. 1975); *Hutchinson v. Lake Oswego School District No. 7,* 519 F.2d 961, 967-68, n.8 (9th Cir. 1975); *Class v. Norton,* 505 F.2d 123, 126 (2d Cir. 1974); *(continued)*

This Court in attorney fee cases not involving the eleventh amendment has discussed fees as part of costs. In *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968), the Court directed the district court to "include reasonable counsel fees as part of the costs" and in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391 (1970), it recognized that generally attorney fees are not allowed as part of costs, but the Court went on to award fees under one of the exceptions to the general rule. Congress too has provided for attorney fees as part of costs in several statutes, *e.g.*, Interstate Commerce Act, 49 U.S.C. §16(2); Securities Act, 15 U.S.C. §77k(e); Civil Rights Act of 1964, 42 U.S.C. §2000e-5(k); Emergency School Aid Act of 1972, 20 U.S.C. §1617. In the latter two enactments, it is clear that states or state officials could be defendants, thus evidencing an interpretation by Congress that the eleventh amendment does not bar an award of attorney fees by a federal court against a state. In these statutes recognizing the validity of awards of attorney fees as

---

(footnote continued from preceding page)

LaRaza Unida v. Volpe, 57 F.R.D. 94, 101-2, n.11 (N.D. Cal. 1972), *aff'd*, 488 F.2d 559 (9th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974); *Downs v. Department of Public Welfare*, 65 F.R.D. 557 (E.D. Pa. 1974); *Sims v. Amos*, 340 F. Supp. 691, 694, n.8 (M.D. Ala.), *aff'd*, 409 U.S. 942 (1972). *Contra, Taylor v. Perini*, 503 F.2d 899 (6th Cir. 1974), *vacated and remanded for further consideration in light of Alyeska*, 421 U.S. 982 (1975); *Jordan v. Gilligan*, 500 F.2d 701 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975); *Murgia v. Commonwealth of Mass. Bd. of Retirement*, 386 F. Supp. 179 (D. Mass.), *aff'd*, 421 U.S. 972 (1975), summary affirmance of decision denying attorneys' fees as a matter of discretion as well as law. *See also* 6 J. MOORE, FEDERAL PRACTICE ¶54.77(2), at 1703 (2d ed. 1976).

part of costs, Congress has treated the two as generically the same and has clearly differentiated attorney fees from awards of back pay and damages.

To classify attorney fees as similar to costs is not an evasion of the eleventh amendment unlike the labeling of retroactive damages as "equitable restitution" in *Edelman, supra* at 665-66. *Edelman* recognized that a state may be required to expend funds incidentally in complying with a federal court injunction. In this case, a state may be required to pay the prevailing party expenses of litigation, including both costs and attorney fees, which are incident to a decree granting declaratory and injunctive relief. Such an award is not damages; it is merely implicit in federal court jurisdiction over the state on a matter of federal law. *Fairmont Creamery, supra.* For these reasons, the eleventh amendment does not bar the award of attorney fees against the state.

II.

ATTORNEY FEES HAVE A PERMISSIBLE "ANCILLARY EFFECT ON THE STATE TREASURY" WHICH IS NOT BARRED BY THE ELEVENTH AMENDMENT

In *Edelman v. Jordan*, 415 U.S. 651 (1974), this Court held:

> The court of appeals was wrong in holding that the Eleventh Amendment did not constitute a bar to that portion of the district court decree *which ordered retroactive payments of benefits* found to have been wrongfully withheld. (emphasis added)

Id. at 678. Clearly in *Edelman* this Court was concerned only with *retroactive welfare payments*

which it indicated were "in practical effect indistinguishable in many aspects from an award of damages against a state." *Id.* at 668. In barring retroactive welfare payments, the Court affirmed the principles of *Ex parte Young*, 209 U.S. 123 (1908), regarding prospective injunctive relief and recognized that subsequent decisions "have authorized equitable relief which has probably had greater impact on state treasuries than did that awarded in *Ex parte Young*." *Id.* at 667. After discussing the impact on the state treasuries of the equitable relief ordered in *Graham v. Richardson*, 403 U.S. 365 (1971), and *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Court stated:

> But the fiscal consequences to state treasuries in those cases were the *necessary result of compliance with decrees which by their terms were prospective in nature*. State officials, in order to shape their official conduct to the mandate of the court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. *Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in Ex parte Young, supra.* (emphasis added)

Id. at 667-68. The real meaning, then, of *Edelman* is clear: retroactive welfare payments are barred by the eleventh amendment, but the fiscal consequences to the state treasury of prospective equitable relief are not barred.

Application of *Edelman* to this case is quite simple. Clearly the relief granted by the district court, *Bond v. Stanton*, 372 F. Supp. 872 (N.D. Ind. 1974), *aff'd*, 504 F.2d 1246 (7th Cir. 1974), *cert. denied*, 420 U.S. 984 (1975), was prospective in nature, *i.e.*, the defendants

were ordered to institute an EPSDT program in compliance with mandatory federal law in the future. Like injunctive relief in *Graham, supra,* and *Goldberg, supra,* this injunctive relief will inevitably have fiscal consequences on the Indiana treasury, *e.g.*, the cost of implementing an EPSDT program in compliance with federal law; the cost of defending the case on the merits in the district court, the Court of Appeals and a petition for a writ of certiorari to this Court; allowable costs in both the district and appellate courts; and *attorney fees.* None of these costs are prohibited by *Edelman.*

The lengthy discussion of the history and nature of attorney fees in *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975), makes it quite apparent that attorney fees are different from damages and the retroactive welfare payments involved in *Edelman.*[3] Rather, for eleventh amendment purposes, attorney fees represent a cost incidental to securing the prospective relief permitted under *Ex parte Young* and *Edelman* and, therefore, they have a permissible "ancillary effect on the state treasury." Contrary to retroactive welfare payments, attorney fees are not a form of compensation "measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials." *Edelman, supra,* at 668. Instead, they are a "necessary consequence of [securing] compliance in the future with a substantive federal-question determination." *Id.*

---

[3] *See also* Note, *Attorneys' Fees and the Eleventh Amendment*, 88 HARV. L. REV. 1875, 1895-96 (1975).

At least two circuit courts of appeals have adopted the "ancillary effect" theory. In *Jordan v. Fusari,* 496 F.2d 646 (2d Cir. 1974), the Second Circuit stated:

> Moreover, it appears to us that the allowance awarded here, as part of an order granting injunctive relief, has at most the 'ancillary effect on the state treasury,' which *Edelman v. Jordan, supra,* 415 U.S. at 668, characterizes as 'a permissible and often inevitable consequence of the principle announced in *Ex parte Young.*' 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908).

Id. at 651. In this unemployment compensation case, although the court found that the state had waived its protection under the eleventh amendment, it clearly forecast the subsequent result in *Class v. Norton,* 505 F.2d 123 (2d Cir. 1974). In *Class,* the court reaffirmed the language of *Fusari* set out above and upheld an attorney fee award of One Thousand Dollars ($1,000) against the state. *Id.* at 126. The First Circuit, in *Sousa v. Travisano, supra,* although relying primarily on the analogy to costs, also held that attorney fees are incidental to the main litigation.

> On the other hand, *the fees are incidental to the main litigation,* which, being for injunctive and declaratory relief, was permissible under the Eleventh Amendment. An award of attorneys' fees is perhaps so 'ancillary' as to be constitutional, even though there will be some drain on the state treasury. (emphasis added)

Id. at 1139.

Petitioners rely primarily on *Jordan v. Gilligan,* 500 F.2d 701 (6th Cir. 1974), *cert. denied,* 421 U.S. 991 (1975), for their interpretation of *Edelman.* The Sixth Circuit interpreted *Edelman* as barring any award which is:

> 'measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.' *Edelman, supra,* 94 S. Ct. at 1358. In our opinion, awards of attorney's fees fall within that classification and are, therefore, barred.

500 F.2d at 710. Reliance on the above quotation from *Edelman* not only ignores the "ancillary effect" doctrine, but it also takes a statement from *Edelman* entirely out of context. The statement was made by this Court not in describing what is barred by the eleventh amendment, but rather in discussing how a monetary, retroactive award is "in practical effect indistinguishable in many aspects from an award of damages against the state." 415 U.S. at 668. Therefore, *Gilligan* is of little value to this Court in making a determination of whether or not attorney fees have an "ancillary effect" on a state treasury which is permitted under the eleventh amendment.[4]

---

[4]Petitioners also rely on *Hallmark Clinic v. North Carolina Dept. of Human Res.,* 380 F. Supp. 1153 (E.D.N.C. 1974), *aff'd* 519 F.2d 1315 (4th Cir. 1975) (a *per curiam* decision making no reference to an earlier opinion of the Fourth Circuit, *Thonen v. Jenkins,* 517 F.2d 3, 7 (4th Cir. 1975), which held fees were not barred by the eleventh amendment). However, the decision of the district court, which was affirmed, states:

> We do not think that *Edelman v. Jordan, supra,* completely disposes of this question. An award of attorneys' fees may be regarded as a natural incident of suits against state officers under *Ex parte Young,* . . . .

380 F. Supp. at 1159, n.12. They also cite *Murgia v. Commonwealth of Mass. Bd. of Retirement,* 386 F. Supp. 170 (D. Mass. 1974), *aff'd* 421 U.S. 972 (1975), which, like *Sims v. Amos,* 340 F. Supp. 691 (M.D. Ala.), *aff'd,* 409 U.S. 942 (1972), relied upon by the court below, was a summary affirmance not binding on this Court in plenary considerations. *Edelman v. Jordan,* 415 U.S. 651, 670-71 (1974); *Massachusetts Bd. of Retirement v. Murgia,* ____ U.S. ____, 96 S. Ct. 2562, 2564 n.1 (1976).

Relevant policy considerations also support respondents' position that attorney fees are within the limits of the permissible "ancillary effect" described in *Edelman*. Fee awards would generally involve substantially less money than the retroactive welfare payments at issue in *Edelman*; therefore, serious disruption of the state's budget would be less likely.[5] Where, as here, the state officials have acted in bad faith in conducting the litigation, an award of attorney fees acts as a deterrent to such conduct and assists the federal court in providing an orderly trial process for both parties.[6] Furthermore, the power to award attorney fees is "of particular value in litigation against the states because of the inappropriateness of other sanctions"[7] for purposes of assuring the orderly administration of justice.[8]

---

[5] The court in *Edelman* implies that the extent of an award's impact on a state's fiscal planning can be a relevant consideration for eleventh amendment purposes. 415 U.S. at 666, n.11. *See* Note, *Attorneys' Fees and the Eleventh Amendment*, 88 HARV. L. REV. 1875, 1881, 1896 (1975).

[6] *Id.* at 1892.

[7] *Id.*

[8] This Court has already held that the eleventh amendment is not an absolute bar to a federal court award of attorney fees. *Fitzpatrick v. Bitzer*, ____ U.S. ____, 96 S. Ct. 2666, 2671-72 (1976). In that case it was held that Congress, in enacting 42 U.S.C. §2000e-5(k) pursuant to §5 of the fourteenth amendment and providing for attorney fees as part of costs in Title VII cases, had limited the state sovereignty embodied in the eleventh amendment. *Id.* at 2671. In another context this Court has held that the eleventh amendment is not absolute and can be waived by the conduct of a state. *See Parden v. Terminal R. Co.*, 377 U.S. 184 (1964), distinguished on the facts in *Employees v. Dept. of Public Health & Welfare*, 411 U.S. 270 (1973), and *Edelman, supra.*

(continued)

Respondents urge this Court to adopt the view that an award of attorney fees against state officials is an

---

(footnote continued from preceding page)

Arguably the bad faith conduct of the defendant state officials in this case not only strengthens the basis for allowing fees as analogous to costs or as a permissible "ancillary effect on the state treasury," but also provides an independent basis for avoiding the eleventh amendment on the ground that its protection has been waived by the conduct of the defendant state officials. While the defendant state officials have not expressly waived the eleventh amendment, this is not necessary under *Parden* where the waiver was based not on express legislative consent but on the state agency's initiation of railroad operations in interstate commerce twenty (20) years after the enactment of the Federal Employers Liability Act. Respondents contend that Indiana's voluntary participation in the federally funded program under the Social Security Act, including acceptance of federal funds, plus the knowing and wilful refusal to abide by the mandatory federal law constitutes a waiver of any protection the eleventh amendment might otherwise provide against an award of attorney fees based on such bad faith conduct.

This Court has held that other recognized immunities and even an individual's constitutional rights can be waived by bad faith and obdurate conduct. For example, in *Illinois v. Allen*, 397 U.S. 337 (1970), misconduct by a criminal defendant in the course of his trial constituted a waiver of his constitutional right to be present at trial and confront witnesses. While the presumption against waiver of such confrontation " 'may be lost by consent or at times *even by misconduct.*' " *Id.* at 343, *quoting Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934) (emphasis added). The rationale in Allen is particularly appropriate in this case where the state was found to have acted in bad faith during the litigation:

> [O]ur courts, palladiums of liberty as they are, cannot be treated disrespectfully with impunity. . . . It would degrade our country and our judicial system to permit our courts to be bullied, insulted, or humiliated and their orderly progress thwarted and obstructed by defendants brought before them charged with crimes.

(continued)

incidental cost of litigation not barred by the eleventh amendment, just as the cost to a state of implementing injunctive relief is "ancillary" and thus a "permissible and often inevitable consequence of the principle announced in *Ex parte Young*," which is not barred by the eleventh amendment. This interpretation of *Edelman* is particularly reasonable and convincing when considered in conjunction with the remedial and deterrent nature of attorney fees, as succinctly described by the court in *Downs v. Department of Public Welfare*, 65 F.R.D. 557, 561 (E.D. Pa. 1974):

> For these reasons, we believe that an award of counsel fees is both clearly remedial and an integral part of a decree providing for prospective relief from violations of federal statutory and/or constitutional rights. In light of the realities of the

---

(footnote continued from preceding page)
397 U.S. at 347.

In *Wood v. Strickland*, 420 U.S. 308 (1975), this Court reached a similar conclusion in discussing the common law immunity of state officials under 42 U.S.C. §1983. While not discussed in terms of "waiver" *per se*, it is evident that Wood carved out an exception to the general rule that state officials are not personally liable for acts done pursuant to their official duties. School board members are *not* immune from liability for damages under §1983 where their "action cannot reasonably be characterized as being in good faith." *Id.* at 322. Again, conduct was held to limit an established immunity.

Thus, under *Parden* it is clear that the state can waive its eleventh amendment immunity and this Court has based waiver of other rights and immunities on the bad faith conduct of individuals. By participating in a federal program and by refusing in bad faith to follow the federal mandates controlling that program, the State of Indiana has arguably waived its immunity from the award of attorney fees ordered by the district court.

> economic conditions of those for whom such suits are most frequently brought and the expense of litigation, the fiscal impact of such awards upon the state treasury must be considered an inevitable, and so a permissible, consequence of the principle of *Ex parte Young*, if that principle is to have any practical impact.

CONCLUSION

While this Court has not yet ruled on the effect of the eleventh amendment on a federal court's inherent equitable power to award attorney fees absent express legislative authorization, it is quite clear from the argument presented by respondents that the fees awarded by the lower court in this case are outside the scope of the eleventh amendment as interpreted by this Court in earlier decisions. State officials, clearly subject to the jurisdiction of the federal courts under *Ex parte Young*, cannot be encouraged to cause and prolong litigation by their bad faith conduct. Such obstruction of judicial order and economy can be avoided only by holding the state responsible for the incidental costs of litigation, including court costs and attorney fees, which are caused by the state's official agents. Therefore, the

lower court order awarding attorney fees should be affirmed.

Respectfully submitted,

IVAN E. BODENSTEINER
Indiana Center On Law & Poverty
Valparaiso University
School of Law
Valparaiso, Indiana 46383
Telephone: (219) 464-5433

Attorney for Respondents

ON THE BRIEF:

DEAN L. SUTTON
Valparaiso University
School of Law
Valparaiso, Indiana 46383